

When the Judiciary Undermines Judicial Independence

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India's Supreme Court has long sought to protect itself, mostly through an insulated appointment system, from political pressures. Judicial independence seems to be the catchphrase for the Indian Judiciary when it is under pressure or attack. But how far has the Court been successful in navigating and managing the problems caused by judicial hierarchies and politics within its very own walls?

Recently, one of the senior-most High Court judges in India, who could have been considered for elevation to the Supreme Court of India, resigned from office. While the exact reasons for her resignation are “unknown”, it did not come as a surprise – mainly because she was transferred to another High Court in a different part of the country. This incident, like many others, sparked a controversy and added fuel to the fire that is the [lack of transparency](#) in India's Supreme Court's appointment system. According to a well-established and long-standing system of appointments, she could have been considered for elevation. Subsequently, her resignation was also sought to be justified by the judiciary by stating that there were “cogent” reasons for her transfer, and that it was made in the interest of [administration of justice](#).

The resignation of Justice Tahiramani is just one in the long list of controversies in the Supreme Court of India. Since the 1990s, India's judges have been appointed by a “Collegium” of judges – essentially a group consisting of the senior-most judges of the Supreme Court of India. Under the Indian Constitution, the Collegium considers the opinion of the executive government when appointing judges, but the final decision about who to appoint rests with the [judiciary](#). Their decisions are taken behind closed doors, and the opacity of the process has been a long-standing topic of discussion. In 2014, the government of India passed a law providing for a Commission to select judges (through a law called the “[National Judicial Appointments Commission Act, 2014](#)” or the “NJAC Act”) which consisted of executive as well as judicial members. However, the law was declared [unconstitutional](#) by the Supreme Court for violating judicial independence. Subsequently, the appointment system was under much scrutiny and discussion, but has remained more or less the same. Following from these cases, India's understanding of judicial independence centres largely around insulating the appointment system from executive and political actors.

While the Supreme Court defends its appointment process as being crucial to judicial independence, there is much to be discussed about the internal workings of the Court and independent decision-making within its walls. Usually, the Chief Justice of India, as the senior-most judge of the Court, decides the allocation of certain cases to judges and benches of judges. Some judges, on occasion, have spoken out publicly on the opaqueness and case allocation procedures of the Supreme Court. [Criticisms](#) point to many issues with the procedure, which included the allocation of

politically sensitive cases to favourable judges. Last year, four of the senior-most judges (after the Chief Justice) of the Supreme Court wrote [a letter to the Chief Justice of India](#) criticising the case-allocation procedures in the Supreme Court of India, stating that there was a lack of transparency in the administrative actions of the Chief Justice in allocating cases. In an unusual move, the judges also held a Press Conference publicly highlighting the issues in the letter they wrote.

While the move of these judges was not of immediate consequence on the working of the Supreme Court, it provided momentum to the discussion on transparency in the judiciary, and shed much needed light on the internal politics of the higher judiciary in India. Several instances in the past have also reflected how judges who decide cases against politically powerful individuals suffer consequences. For instance, the work of a judge of a state High Court was suspended soon after he commented on the lack of speediness in certain politically- sensitive criminal trials. He stated explicitly in one of his [orders](#) that such delays were made with the intent of stalling the delivery of justice through unfair means such as evidence tampering. In addition, he publicly talked about [growing corruption](#) in the judiciary, a move that was evidently [not taken well by the other members of his Court](#). More recently, another High Court judge who was known to openly criticise the current government, and has often given decisions which did not go down well with the government, was not made Chief Justice of a larger High Court as originally planned. Instead, he has been made Chief Justice of a smaller High Court, in a transfer order that was made public – but [without any reasons](#) stated for the change of transfer. In fact, transferring a judge from a larger, favourable High Court to one that is remote, or not so favourable geographically (for instance, in a smaller state) is a commonly employed “punitive” measure. Often, judges who have favours or relationships with senior judges of the Supreme Court or the Executive get promoted to more favourable positions.

Such incidents will send a message to judges to stay within an invisible line when dealing with politically sensitive cases. It is difficult to say that a judge in this position will enjoy decisional independence – while they themselves may not be working directly under political pressures, there is an expectation to function in a certain way, also keeping in mind judicial hierarchies.

This lack of transparency has also created an undemocratic atmosphere in the highest Court of India. As Justice Ajit Prakash Shah has said recently: “As a democracy, it seems anomalous that we continue to have a judiciary whose essence is determined by a process that is evidently undemocratic.” After the Supreme Court struck down the NJAC Act, there was an uproar among members of the legal community and academia, criticising the Supreme Court for resisting a move towards more transparency in the Indian judiciary. Even judges who were part of the Bench which delivered the judgments spoke out against the [deep-rooted problems with the Collegium system](#). These internal problems being highlighted and investigated by media is also eroding public faith in the judiciary.

The way forward: thinking of new accountability mechanisms

What is the solution? On the one hand, the judiciary in India has defended its independence fiercely, particularly after past attacks from strong executive power. But equally important to its functioning and independence is a holistic and workable accountability mechanism. Since appointments are such a controversial issue, the problems and solutions often start with a discussion on how to improve and streamline the judicial appointments procedure in India.

The idea of an [All India Judicial Service](#) has been in the works, which could be modelled along the lines of the exams which currently exist to select bureaucrats to the Executive. However, before such a system can become a functioning reality, there must be a system also in place for supervision and control of this examination. The High Courts in India are also numerous, and coordinating the examination and what factors must be tested, what weight should be given to different skills and knowledge required to be a suitable judge, needs to be contemplated. The idea of a [performance evaluation system](#) for the higher judiciary was also being floated in India. Any [potential performance evaluation system](#) would also have to withstand the test of judicial independence, as laid down in numerous Supreme Court judgments. However, for any of these solutions to be manifested into reality, India's judiciary must be truly independent from politics, and not just in theory – i.e. not only by insulating the executive from the system of appointments. While the system of appointments seeks to root out any executive involvement, the fact that politically unfavourable judges are being transferred arbitrarily, and the continuing opacity in the appointment system, beg the question of how independently the judiciary actually functions. India's understanding of judicial independence must look beyond the constitutional interpretation in the context of appointments and also seek to understand the issues it faces in reality that threaten its independence from within.

